

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

**RE: PETITION OF BAY STATE GAS COMPANY
FOR APPROVAL OF REVISED TARIFFS**

DTE 05-27

**LOCAL 273 MEMORANDUM IN SUPPORT OF
MOTION TO PRESERVE STATUS QUO AND PRESERVE DEPARTMENT'S
JURISDICTION PENDING FINAL DECISION**

I. INTRODUCTION

Local 273 of the Utility Workers Union of America “(Local 273)” files this Memorandum in Support of its “Motion to Preserve Status Quo and Preserve Department’s Jurisdiction Pending Final Decision.” This Memorandum will begin with a review of the facts already stated in the “Motion to Preserve Status Quo;” address the general question of the Department’s jurisdiction to issue an order to preserve the status quo while a rate case investigation is ongoing; and finally address why such an order should be granted in this specific case.

II. REVIEW OF THE FACTS¹

NiSource, the parent company of Bay State Gas Company (“Bay State”) has recently chosen IBM to outsource jobs in as many as seven NiSource departments. On May 24, 2005, NiSource President Robert Skaggs circulated a memorandum advising employees that the outsourcing arrangement “will result in some job eliminations.” As many as 100 jobs at Bay State could be affected, particularly among billing staff and those involved in providing customer

¹ Citations to the Affidavit of Kevin Friary and other sources supporting the facts asserted in this Memorandum are included in the “Motion to Preserve Status Quo.”

service. NiSource recently circulated to some of its Bay State employees an “IBM Personal Profile Sheet” that is being used to catalog employees’ skills and functions and facilitate the final decisions on which jobs will be outsourced. Based on this recent activity and public statements by NiSource, it appears likely that NiSource will announce this month which jobs will be outsourced.²

Staff reductions will cause grave and irreparable harm to the affected employees. In the billing and customer-service job categories that are most likely to be affected, most of the employees are women, many of these single-parent heads of household. Loss of their jobs would be devastating.

Outsourcing and job reductions can also have serious, adverse effects on customer service and public safety if implemented too hastily and if motivated too heavily by the mere desire to cut costs. NiSource and Bay State have been extremely aggressive in reducing staffing levels and in their plans to outsource jobs.³ Approximately three years ago, Bay State reduced the staffing levels at its Springfield, Massachusetts call center that serves both Bay State’s Massachusetts customers and customers of its Northern Utilities affiliate in New Hampshire and Maine. Telephone response time at the call center plummeted. As a result of the inferior telephone

² For example, on June 12, 2005, the Associated Press ran a story, “NiSource prepares to transfer jobs in IBM deal,” in which NiSource spokeswoman Kris Falzone stated that “employees were being asked to submit the profiles now so NiSource can tell them the status of their jobs in June.” The article is on line at <http://www.wthr.com/Global/story.asp?S=3402727>.

³ See, for example, “IBM gets outsourcing jobs at NiSource, Final plans could be in place by June,” *Munster (IN) Times*, April 29, 2005, which cited industry analysts who “already are saying NiSource plans to ‘raise the bar’ on outsourcing in the utility industry.” The article is available at <http://www.openoutsource.com/resource-dated20359-IBM%20gets%20outsourcing%20job%20at%20NiSource.phtml>

response time, the New Hampshire Public Utilities Commission fined Northern Utilities for five straight months.⁴ The Maine Public Utilities Commission opened a management audit into Bay State's affiliate Northern Utilities.⁵ This is a clear example of how NiSource's incessant drive to cut costs can adversely affect service quality.

In 1998, Bay State decided to outsource its locating function, that is, the function of locating and marking gas lines in connection with construction, street openings and the like. Local 273 urged the company not to do so due to the potential risks to public safety. On March 4, 1998, a gas explosion in Attleboro killed two people, destroyed one home, and damaged 68 other homes. The explosion resulted from the failure of an employee of the outsourced locating service to note that there was a gas line running to the house that was destroyed. This is a sad and tragic example of how the company's short-sighted drive to cut costs through outsourcing endangered public safety and resulted in the death of two people.

III. THE DEPARTMENT HAS THE LEGAL AUTHORITY TO PRESERVE THE STATUS QUO WHILE A RATE CASE IS PENDING

Should NiSource and Bay State be allowed to go ahead immediately with its outsourcing plans, it will reap the windfall of reduced costs. Ratepayers will not gain because there will be no concomitant reduction in rates. The Department can and should preserve the status quo and preserve its jurisdiction to set just and reasonable rates by prohibiting NiSource and Bay State from proceeding with outsourcing and reductions in staffing levels among Bay State employees

⁴ NHPUC DG 01-182.

⁵ MEPUC 2002-140 (May 16, 2002).

until a final decision can be reached in this case.

The Department unquestionably has the authority to issue the requested order. The legislature has invested the Department with “general supervision of all gas and electric companies” including the authority to “make all necessary examination and inquiries,” in order to ensure the “safety and convenience of the public.” G. L. ch. 164, § 76. This authority has been broadly interpreted by the courts. *See, generally, Fitchburg Gas and Elec. Light Co. v. Department of Telecommunications and Energy*, 440 Mass. 625 (2004) (upholding the authority of the department, under § 76, to ensure that companies are in “compliance with the provisions of law and the orders, directions and requirements of the department”); *Cambridge Electric Light Co. v. DPU*, 363 Mass. 474, 496 n. 35 (1973) (noting that detailed regulation of utilities under § 76 does not amount to undue interference with management).

More germane to the present issue of outsourcing and staff reductions, the legislature has specifically invested the department with not only the authority but the obligation to “establish service quality standards” for all electric and gas companies, including “benchmarks for employee staff levels.” G. L. ch. 164, § 1E(a). For a company that “makes a performance based rate filing,” as Bay State has here, the company “shall not be allowed to engage in labor displacement or reductions below staffing levels in existence on November 1, 1997,” unless certain strict conditions are met. G. L. ch. 164, § 1E(b). Bay State, which has now made a “performance based rate filing,” has reduced its staffing levels approximately 35% since the end of 1997, according to its own filings with the Department.⁶ One of the central purposes of the

⁶ In DTE 05-12, Bay State reported having 815 employees in 1998 and only 504 employees in 2003, a reduction of 311 employees, or more than 35%.

current outsourcing plan is to reduce staffing levels further. The Department need not immediately decide that the outsourcing plan violates G. L. ch. 164, §§ 1E(a) & (b), but it can easily find that it has full authority to preserve the status quo until such time as it can determine the applicability of these and other statutory provisions to the proposed outsourcing plan.

The Department also has broad authority under its rate setting powers specified in G. L. ch. 164, § 94. The Department has the authority to suspend rates while it “investigate[s] the propriety of any proposed rate.” *Id.*, 2nd ¶. Inherent in this authority to suspend and investigate rates is the authority to take necessary actions to preserve its jurisdiction while the investigation is ongoing. “Where a legislative body has entrusted an administrative agency with the responsibility of selecting the means of achieving a statutory policy the relation of remedy to policy is peculiarly a matter of administrative competence.” *University Hospital, Inc. v. MCAD*, 396 Mass. 533 (1986) (upholding right of MCAD to issue interrogatories and to impose sanction for failure to respond, despite lack of explicit statutory authority to do so). Here, the legislature has entrusted the Department with selecting the means by which it will investigate a company’s proposed rate hike increase and set just and reasonable rates. It is within the “administrative competence” of the Department to determine that it may issue an order to preserve the status quo pending the final determination of a rate case.

IV. BASED ON THE PRESENT FACTS, THE DEPARTMENT SHOULD ISSUE AN ORDER TO PRESERVE THE STATUS QUO

The present facts provide good reason for the Department to issue an order to preserve the status quo and preserve its jurisdiction pending the final determination of this proceeding.

NiSource and Bay State may soon announce outsourcing and staff reductions affecting Bay State

employees. Any such staff reductions will cause serious and irreparable harm to the employees directly affected. Many of the employees who are most likely to be affected are women, often single-parent heads of household who are the sole source of income for their families. Given the types of jobs that they hold, they do not have the ability to support their families for very long without a regular pay check.

While this harm to employees is of course of great concern to Local 273, of greater relevance to the Department is the harm that could befall ratepayers and the impact on the Department's own ability to set just and reasonable rates. The Department is under the obligation to establish and enforce service quality standards and to set benchmark staffing levels. G. L. ch. 164, § 1E(a). Moreover, for a company that files a performance based rate plan, a company cannot reduce its staffing levels below November 1997 levels unless certain conditions are met. G. L. ch. 164, § 1E(b). Under the company's plan, it will go ahead and reduce staffing levels, which may also adversely affect service quality, before the Department has any opportunity to review the company's compliance with these staffing level and service quality mandates. In addition, the company will be allowed to reap the entire financial gains of reducing its staffing as there will be no concomitant reduction in rates charged to customers. The Department should protect ratepayers from having to pay rates set on a much higher staffing level than the company actually maintains.

Local 273 maintains that there would be little harm to the company from the issuance of the requested order. At most, the company will have to defer making Massachusetts-based staff reductions for a few months, that is, for the period between when it would have otherwise planned to effectuate the outsourcing-related staff reductions and the final decision in this case.

For a highly-regulated company that has been aware of the staffing-level and service quality requirements of G. L. ch. 164, § 1E for seven years, Bay State cannot be heard to complain that this amounts to undue harm.

Local 273 views the order it has requested as one the Department could issue *sua sponte* to protect its jurisdiction while the investigation of Bay State's rate filing proceeds to final determination. But even if the request is weighed against the traditional standards for the granting of a preliminary injunction by a court, the Department should issue an order to preserve the status quo and preserve its own jurisdiction. Under *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. 609, 616 (1980), a court reviewing a request for a preliminary injunction considers the likelihood of the petitioning party succeeding on the merits and the harm that would befall that party if the order is not granted, while also weighing the harm to the opposing party if the order is granted. Local 273 is likely to prevail on its claim that Bay State is in violation of the staffing level requirements of G. L. ch. 164, § 1E. Bay State has already reduced its work force by over 300 employees, roughly 35%, since 1998 and is proposing to reduce that staff further. Any staff reductions will cause irreparable harm to the affected workers and may lead to declines in service quality. Staff reductions that are effectuated prior to a final decision in this case will interfere with the Department's to render a meaningful decision in this case, as it would be extremely difficult to reverse any outsourcing programs and staff reductions once they have been implemented. As noted above, the harm to the company of granting the requested order would be minimal. To the extent NiSource or Bay State have entered contractual commitments with IBM, NiSource/Bay State proceeded at their own risk as the laws that limit the ability of companies to unilaterally reduce staffing levels have been on the books for seven

years.

V. CONCLUSION

Local 273 asks the Department to issue an order prohibiting Bay State from reducing its staffing levels in Massachusetts until a final order is issued in this case and also requests oral argument on its motion.

Respectfully Submitted,

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